

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA -10-0050

IN RE THE MARRIAGE OF

MAGGIE RAE BROWN,

Appellee/Petitioner,

And

RICHE ALLEN HOLLAND,

Appellant/Respondent.

APPELLANT BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Flathead County,
the Honorable Katherine Curtis, Presiding

APPEARANCES:

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STATEMENT OF ISSUES

- I. Whether the District Court properly valued the marital estate.**
 - A. Whether the allocation of the marital estate as determined by the District Court failed to equitably divide the marital estate.**
 - B. Whether the District Court abused its discretion when it allocated over 80% of the debt of the parties to Riche.**
 - C. Whether the District Court abused its discretion when it failed to consider the tax implications and liquidation costs associated with liquidating Big Sky Curbing and the sale of the log loader.**
 - D. Whether the District Court erroneously used the Financial Statement of the parties to depict the value of marital assets.**
- II. Whether the District Court failed to consider the best interests of the minor children and improperly adopted Maggie's proposed Final Parenting Plan.**
- III. Whether the District Court abused its discretion when including personal property belonging to a third party (Jody Weatherill) in the marital estate.**

STATEMENT OF THE CASE

This matter is on appeal from the Eleventh Judicial Court's Findings of Fact, Conclusions of Law and Order issued by the Honorable Katherine R. Curtis on January 12, 2010.

A non-jury trial on the merits was heard on August 6-7, 2009. Appellant Riche Holland (Riche) was present with his counsel, George Best. Appellee Maggie Brown (Maggie) was present with her counsel David Stufft. The District Court heard testimony of witnesses and received exhibits into evidence.

Appellant Riche Holland appeals the District Court's findings, conclusions and order that distributed the marital estate and ordered a parenting plan.

STATEMENT OF THE FACTS

Riche and Maggie had been married under common-law for approximately 14 years at the time of this proceeding. *[Non-Jury Trial Transcript, Thursday, August 6, 2009, P. 254, l.8-9]* They had two children, A.R.H. born July 18, 1995 and C.A.H. born February 9, 2000. *[Findings of Fact, Conclusions of Law and Decree of Dissolution, Page 1, para.2]*

Riche owned and operated Big Sky Curbing during the marriage which is a concrete curbing business that does decorative curbing and edging. Riche purchased the business in about 2004 and paid \$20,000 for the tools and \$20,000 for the name of the business. At the time of trial Riche valued his depreciated

business equipment at \$5,000. Other than equipment, Big Sky Curbing has no other value. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 33-35]* Riche testified he has income of approximately \$44,000 per year. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 53, l. 7-21]* Riche has no retirement funds and only about \$500 in a savings account. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 45, l.17-22]*

With regard to values of property, Riche Holland was questioned extensively regarding a 2009 financial statement. First Interstate Bank required a financial statement from Riche Holland due to their internal policy as he had an outstanding commercial loan with them. As of June 4th, Riche had a commercial loan in the amount of \$18,800. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 128, l.2-13; P. 130 l.11-25; P. 131, l.1-15]* On the financial statement Mr. Haidle, loan officer for First Interstate, wrote a figure of \$100,000 as the value of Big Sky Curbing based upon Riche's gross receipts. Mr. Haidle testified that this was an arbitrary figure and that he has never valued a business and did not do a valuation on Big Sky Curbing. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 134, l.1-23; P. 136, l. 12-24]* Riche testified that he did not supply a figure of \$100,000 as value for the business. *[Non-Jury Trial Transcript, Thursday, August 6, P. 77-78]*

Maggie had been employed at the United States Postal Service for four years at the time of this proceeding. *[Non-Jury Trial Transcript, Thursday, August 6, P. 115, l.19-24]*. Her taxable income for 2008 was \$43,020, which was comparable to Riche's net income. *[Non-Jury Trial Transcript, Thursday, August 6, P. 172, l.15-16]* But Maggie also received benefits of health insurance and a Thrift Savings Plan through her civil service employment which Riche did not as he was self-employed. *[Non-Jury Trial Transcript, Thursday, August 6, P. 150, l.9-20; P. 193, l.8-11]*

During the marriage the parties purchased property at 3435 Tobacco Road in Eureka, Montana and began building a home in approximately 2005 while living in a fifth-wheel camper. *[Non-Jury Trial Transcript, Thursday, August 6, P. 118, l. 6-11 and P. 137, l. 7-18]*

In October of 2005, Maggie began working for the post office in Kalispell and commuted back and forth to Eureka for about a year. *[Non-Jury Trial Transcript, Thursday, August 6, P. 136, l.18-25 and P. 137, l. 1-6]* By 2007 Maggie began renting places in Kalispell and in June of 2008 she purchased a home in Kalispell at 106 Fifth Avenue West. *[Non-Jury Trial Transcript, Thursday, August 6, P. 127, l. 6-19]* William Fisher testified that he helped deliver 15 pickup loads of personal belongings to Kalispell for Maggie between 2007 and 2008 including a washer, dryer, furniture, mirrors, a table and many boxes. *[Non-*

Jury Trial Transcript, Friday, August 7, 2009, P. 105-110] At trial Maggie denied that she had received any substantial personal property from the marital home, but then also testified that she didn't want the leather seat or other items left at the marital home when she left (and which later burned in the fire). She stated she had everything out of there that she wanted. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 39, l. 3-25]* Riche kept the marital belongings that Maggie didn't want which included the children's belongings, all of which were lost in the fire. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 40, l.1-9]*

The parties had separated at the time of Maggie's purchase of the Kalispell home. In August or September of 2008, Riche's girlfriend, Jodi Weatherill, moved into the Eureka home with him. *[Non-Jury Trial Transcript, Thursday, August 6, P. 96, l. 11-17]* The home and everything in it was lost to a fire on February 1, 2009. *[Non-Jury Trial Transcript, Thursday, August 6, P. 10, l.15-17]*

Riche began making claim to Safeco Insurance Company for the fire losses. On March 26, 2009 the Court issued an Order requiring Riche to deposit checks received from Safeco for the loss of the home and for loss of personal property into the trust account of his attorney. *[Order Granting Ex Parte Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Issued During The Pendency Of This Matter, March 26, 2009]*

The Court, in error, declared that Riche delivered only one check to his attorney for the amount of \$119,195.48. *[Findings of Fact, Conclusions of Law and Decree of Dissolution, Page 3, para.10a,b]* The check for \$119,195.48 represents the equity in the marital home after payment of the mortgage. *[Non-Jury Trial Transcript, Thursday, August 6, P. 84, l. 2-6]* In response to questioning at trial, Riche testified that he did receive other checks, that he believed that he complied with the Court's Order, that he deposited a check for the loss of structure and also produced all documents that he had kept in his possession. Some checks had been sent back to Safeco and some checks were issued as payment for other parties that did work at the property. *[Non-Jury Trial Transcript, Thursday, August 6, P. 11, l.5-10; P. 13, 14, 15; P. 22.]*

Riche had no documents to produce as all lists and notebooks that itemized Riche's losses were provided to Safeco after the fire and were taken by the Safeco representative. *[Non-Jury Trial Transcript, Thursday, August 6, P. 42]* Checks had also come in for Riche's business at the same time he began receiving Safeco checks and one check was not deposited into the trust account of Riche's attorney's purely by accident. *[Non-Jury Trial Transcript, Thursday, August 6, P. 28-29]* Although he was questioned extensively to show that he somehow did not comply with the Court's Order and was somehow hiding information, Riche adamantly testified that when he received checks that were payable to him for losses, he sent

them back. When he received checks for someone who did snow-plowing or to other people who did work, they were deposited and paid out. *[Non-Jury Trial Transcript, Thursday, August 6, P. 29, l.23-25, P. 30-31]*

The Court also declared that Riche failed to respond to discovery, but Riche fully explained the logistics behind each of the checks that the Court listed in its findings. *[Findings of Fact, Conclusions of Law and Decree of Dissolution, Page 3, para.10d]* A \$5,000 check was for the immediate loss of use of his belongings and home. *[Non-Jury Trial Transcript, Thursday, August 6, P. 15, l.5-10]* A \$5,000 check was for the plumber and excavation company. *[Non-Jury Trial Transcript, Thursday, August 6, P. 16, l.3-9]* A check for \$61,695.83 was for loss of personal property, but as it was for property that was actually Jodi's, Riche did not want to cash it because as he replied time and again in questioning "it's not my check" and he sent it back to Safeco. *[Non-Jury Trial Transcript, Thursday, August 6, P. 29-36]* A check for \$200 was for snowplowing. *[Non-Jury Trial Transcript, Thursday, August 6, P. 30, l.10-15]* A check for \$4,449 was only discussed in questioning of Jodi and she had no knowledge of the receipt of it. *[Non-Jury Trial Transcript, Thursday, August 6, P. 106, l.12-15]* A check for \$28,679 was returned to Safeco as it was not Riche's check. *[Non-Jury Trial Transcript, Thursday, August 6, P. 31, l.10-16]*

Exhibit 30 is a list of the payments made out by Safeco as of 7/21/2009, and it also clearly shows that the checks for \$61,695.83, \$28,679, and \$13,807.50 were returned to Safeco – just as Riche testified at trial.

Jodi testified that she did make a claim to Safeco for things she lost in the fire. She also testified that she brought many personal belongings from her prior marriage, including dishes, bedding, and furnishings. *[Non-Jury Trial Transcript, Thursday, August 6, P. 102, l. 23-25 and P. 103, l. 3-7]*

Respondent's Exhibit D, a duplicate of Petitioner's Exhibit 6, was the list that was submitted to Safeco identifying personal property that was lost in the fire. The Court failed to allow demonstrative Exhibit E into evidence, but stated that it would add up the items that Jodi marked on Exhibit D which reflected all items that Jodi personally lost in the fire. All items not marked with red ink on Exhibit D were Jodi's. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 89 - 94]* Jodi's personal property (identified on Exhibit D and itemized on Exhibit E[not admitted]) totaled over \$56,000.

In its Findings, the Court stated that it found Exhibit 7 more credible than Exhibit D. Exhibit 7 is a demonstrative exhibit that Maggie prepared, based upon her recall, as items that were not in the home before she moved out. *[Non-Jury Trial Transcript, Thursday, August 6, 2009, P. 281, l.3-9]*

The Court gave Maggie the value of most all personal property, Jodi's included, even though Maggie had told Riche she didn't want it prior to Riche receiving payments from the fire insurance claim.

When the parties separated in 2008, there was substantial credit card debt. Riche testified that the credit card debt of \$25,000 listed on Petitioner's Exhibit 1, line 47 was Maggie's. He explained that Maggie had a high interest card with charges for furniture, roofing, etc. which he offered to transfer onto one of his lower rate cards that had a zero balance. Riche offered to help Maggie pay on the card until it reached a \$500 payment per month that she could afford. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 27, l.17-25; P. 28, P. 29, l.1-4]* Maggie paid \$500 a month to Riche until April of 2009 when her attorney advised her to stop making payments. *[Non-Jury Trial Transcript, Thursday, August 6, 2009, P. 147, l.9-23]* Riche took all of Maggie's credit card debt onto his card at the time of separation and added to it with purchases to put a roof on her Kalispell house. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 27, l.1-10; P. 29, l.17-25; P. 30, l.1-4]*

Petitioner's Exhibit 1, line 40 [VISA - \$6,029] is a credit card debt to put a motor into a log loader. Petitioner's Exhibit 1, line 42/43 [Capital One - \$3,962] is a credit card debt from finishing the basement of the parties' home. Petitioner's Exhibit 1, line 44/45 [Chase Mastercard - \$9,487] is also for finishing the

basement. All of the aforementioned cards were incurred during the course of the marriage. *[Petitioner's Exhibit 1; Non-Jury Trial Transcript, Friday, August 7, 2009, P. 30]*

Maggie testified that all of the debts and obligations should be paid with the liquid assets of the marital estate before any distribution of assets would be made. *[Non-Jury Trial Transcript, Thursday, August 6, 2009, P. 273, l.3-10]*

For the four years that Maggie worked in Kalispell prior to the divorce, Riche handled getting the children to and from school and their activities. The children always resided in Eureka and Riche felt it would not be in their best interests to leave the Eureka community. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 23, l. 21-24]* Riche got the children to all of their practices for sports, took them to school every day, the children made good grades and they have many friends in Eureka. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 13, 14, 21, 22, 23]* According to Maggie, Riche was in charge of all the children's day to day activities such as homework, parent teacher meetings and medical needs such as braces for A.R.H. The children received good grades in Eureka, are good students and popular with friends. Riche got them to all of their activities such as wrestling, baseball, basketball, volleyball and baseball in Eureka. *[Non-Jury Trial Transcript, Thursday, August 6, P. 257-262]* Riche feels he has a different set of rules for parenting the children, is a bit stricter, and tells them he

does not want to hear anything bad about Maggie and her boyfriend. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 18, 19]*

While living in Kalispell, Maggie moved from place to place until she purchased a home. *[Non-Jury Trial Transcript, Thursday, August 6, P. 187-189]* At the time of trial, Maggie had two full-time roommates living in her Kalispell house, plus four other people in one of the extra bedrooms. *[Non-Jury Trial Transcript, Thursday, August 6, P. 161, l. 1-13]*

At trial, Maggie testified to the Court that she should have residential custody of the children in Kalispell. In preparation of moving the children to Kalispell, Maggie had not made arrangements for a doctor for them in Kalispell nor schooling, nor had she any idea what her work schedule might be at the post office. *[Non-Jury Trial Transcript, Thursday, August 6, P. 264-266]* She explained that her mother would move in to help her and her roommates would help her care for the children when she was at work. *[Non-Jury Trial Transcript, Thursday, August 6, P. 172, l. 20-25, P. 173, l. 1-4]* But, Maggie testified that at the time of trial her mother was being treated at an inpatient facility in Missoula for depression and was being released the next week. *[Non-Jury Trial Transcript, Thursday, August 6, P. 270, l. 6-25]* Her mother had also been in the Pathways treatment center for depression in the past. *[Non-Jury Trial Transcript, Thursday, August 6, P. 271, l. 21-25 and P. 272, l. 1-3]* Maggie told the Court that she would

rely heavily on her roommates for help with caring for the parties' minor children from getting them to sports practices, games and entertaining them through the summer. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 7-11]* When questioned who would care for the children while she was at work, Maggie's standard response was "I would figure it out." *[Non-Jury Trial Transcript, Thursday, August 6, P. 270, l. 2-5]* *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 11, l. 11-12]*

Despite Maggie's acknowledgment that the children had many friends in Eureka, were good students and participated in many Eureka sports, she felt that there were many more opportunities for the children in the Kalispell area academically and extracurricular. Maggie did not feel it detrimental for the children to give up their friends, school and teammates to move to Kalispell. *[Non-Jury Trial Transcript, Thursday, August 6, P. 262, l. 15-25, P. 263, l. 1-5, P. 264, l. 5-8]*

STANDARD OF REVIEW

"The distribution of the marital estate is governed by §40-4-202, MCA. This statute vests the district court with broad discretion to apportion the marital estate in a manner which is equitable to each party under the circumstances." *In Re Marriage of Zander*, 262 Mont. 215, 864 P.2d 1225 at 1229 (1993) [citations omitted]

As is also quoted *In Re Marriage of Laster*, 197 Mont. 470, 643 P.2d 597 at 601 (1982) “. . . Section 40-4-202 is flexible and it vests a good deal of discretion in the District Court . . . We have stated, before and after the adoption of the statute, that each case must be looked at individually, with an eye to its unique circumstances . . .” (Citations omitted.) *In re Marriage of Aaneson* (1979), Mont., 598 P.2d 1120, 1123, 36 St. Rep. 1525.

“When there is substantial credible evidence to support the court’s findings and judgment, this Court will not alter the trial court’s decision unless there is an abuse of discretion.” *In Re Marriage of Scoffield*, (Mont. 1993), 852 P.2d 664, 50 St. Rep. 560. *Zander* at 1229.

The court ignored the best interests of the children in failing to consider all necessary requirements of M.C.A. 40-4-212.

The Court reviews a district court's award of child custody to determine if the court's findings are clearly erroneous. *In re Marriage of Epperson*, 2005 MT 46, 326 Mont. 142, 107 P.3d 1268. “Findings are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or this Court's review of the record convinces it that a mistake has been made. *In re Marriage of Olson*, 2005 MT 111, 327 Mont. 82, 111 P.3d 686. The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting

in substantial injustice. *Epperson, P17.*” *In re Marriage of Dennison*, 2006 MT 56, 132 P.3d 535 (Mont. 2006)

The district court in the present case did exceed the bounds of reason, and did not apply conscientious judgment in distributing the marital estate, adopting a parenting plan and rendering a final decree in this matter.

SUMMARY OF ARGUMENT

The District Court erred in assigning the value of \$100,000 to the marital business.

The District Court erred in awarding the entirety of net proceeds to Maggie without consideration of the need for preparation of a new building site, cost of clean-up, and reattachment of necessary public utility service and the necessity of payment to contractors for restoration.

In Findings of Fact, page 3, the Court clearly erred in stating that Jodi did not participate in making a claim to Safeco and that the furnishings, dishes and bedding destroyed in the fire belonged to Riche.

The Court abused its discretion in giving Maggie the bulk of the value of the personal belongings lost in the fire. Maggie had less knowledge of the personal property in the home than Jodi and Riche. Maggie had not lived in the house since between June and August of 2008. Jodi had lived in the house since mid-August of 2008. The fire was February 1, 2009.

The Court abused its discretion in failing to give consideration for the items that clearly belonged to the children who had lived in the family home for their entire lives.

The Court abused its discretion when it did not require payment for the debts that were incurred during the course of the marriage, the debts that were due to finishing the marital home and therefore part of the fire loss, from the fire loss claim, but instead gave all fire insurance proceeds to Maggie and all marital debt to Riche.

The Court erred in not requiring payment of marital debts from the liquid assets of the marital estate.

The Court abused its discretion in failing to give consideration to Riche for any of the mortgage payments he made on the Eureka home between June 2008 and February 1, 2009.

The Court abused its discretion in failing to give consideration to tax consequences or an accounting for the tax liability and costs to liquidate the business Big Sky Curbing.

The Court abused its discretion in changing the primary parenting arrangements of the children to uproot them from their childhood community simply to have them live with Maggie who had no concrete arrangements

whatsoever to provide for their care and stability. The Court erred in not applying the best interests standard when changing the residency of the children.

ARGUMENT AND AUTHORITIES

I. The District Court erred by improperly valuing the marital estate given the extenuating circumstances involved when the marital home was destroyed by fire.

Maggie began working with the U.S. Postal Service in Kalispell in 10/2005, lived with friends in Kalispell, and commuted to Eureka for the first year. The parties effectively separated in late 2006 when Maggie moved to Kalispell. The Eureka home was not even built or completed by January of 2007 as the parties were still living in a 5th wheel trailer. Maggie purchased a home in June of 2008 with some contribution by Riche. Divorce proceedings began in October 2008.

On February 1, 2009, the marital home in Eureka was entirely destroyed by fire. All personal property therein was destroyed.

The building site of the home was entirely damaged and disrupted during clean-up.

The Court excluded the cost of clean-up, restoration of the building site, and reattachment of necessary public utility service and awarded to Maggie the entirety of insurance funds received for the home.

The district court's division of marital property in the present case, as per the findings of fact upon which the division is based, is clearly erroneous. *See In re*

Marriage of Lee (1997), 82 Mont. 410, 938 P.2d 650. *In Re Marriage of Helzer*, 2004 MT 352, 102 P.3d 1263 (Mont. 2004).

The trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re Marriage of Wessel*, 220 Mont. 326, 715 P.2d 45 (1986)(citations omitted). *Kovarik v. Kovarik*, 1998 MT 33, 954 P.2d 1147 (Mont. 1998)

A. The allocation of the marital estate determined by the district court fails to equitably divide the marital estate.

The standard for division of marital property rests within M.C.A. 40-4-202.

(1) In a proceeding for dissolution of a marriage, . . . the court, without regard to marital misconduct, shall, . . . finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the

contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit.

M.C.A. 40-4-202

The Court apportioned 12 acres to Maggie (which was undivided and unimproved) from the 20 acre parcel owned by the parties. Riche received the 8 acre parcel where the home had been situated. The Court failed to give any consideration to the expense necessarily to be borne by Riche in rebuilding a home.

Riche lived solely on the Eureka property with the minor children for at least two years prior to the start of the dissolution proceeding. The Court entirely ignored post-separation contribution to the marital real estate by Riche.

Substantial work had been done on the Eureka real estate after the fire and prior to trial. Insurance proceeds were frozen. Many contractors had not been paid or had been paid out of personal funds of Riche. In the distribution, the Court entirely ignored post-fire costs by third parties to clean up the property, restore the property, and bring the land to a condition for rebuilding.

On October 1, 2005, Maggie moved to Kalispell and began working with the U.S. Postal Service. With some financial assistance from Riche, Maggie purchased a home in Kalispell in June of 2008.

In the distribution, the Court ignored Maggie's government employment

benefits and income potential plus her acquisition of real property in Kalispell.

No consideration was given to Riche for any of the mortgage payments he made on the Eureka home between June 2008 and February 1, 2009.

The Court, in distributing all of the proceeds from the fire insurance policy to Maggie as well as 2/3 of the marital real estate, creates a grossly inequitable division.

As in *Laster*, “the District Court did not have sufficient competent evidence to properly evaluate the marital estate. While it is true that the trial court was not given the best evidence on which to base its valuations, the District Court's determinations of values will stand unless they are clearly erroneous.” *Laster*, 643 P.2d 597 at 601.

If the findings underlying a district court's division of property are not clearly erroneous, then the court's distribution is discretionary and is reviewed for an abuse of discretion. *Stufft*, 916 P.2d at 770. In evaluating abuse of discretion, we look to whether “the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” *In re Marriage of Wessel* (1986), 220 Mont. 326, 333, 715 P.2d 45, 50. See *Carpenter v. Carpenter*, 1998 MT 171N (Mont. July 28, 2000).

The District Court heavily relied on the Financial Statement in which both Riche and Mr. Haidle testified were arbitrary figures. Riche contends that the

values used by the District Court are erroneous. The District Court failed to exercise conscientious judgment which created substantial injustice to Riche.

B. The District Court abused its discretion when it allocated over 80% of the debt of the parties to Riche.

The Court gave Riche his business with an inflated value which earns him a living solely dependent on the economy. On the other hand, Maggie had a guaranteed job with the opportunity for advancements and benefits with USPS.

Maggie testified the debt should be paid from the liquid assets. The Court gave Riche largely all the debt and minimal liquid assets.

Petitioner's Exhibit 1 listed a Chase-Visa card that the Court allocated to Riche in the amount of \$25,000. As Riche testified, that debt was transferred to a card he held for debts Maggie incurred – solely to help her out. Maggie admitted that some of the credit card bills that were transferred to Riche's card were from her "gambling spell", but she didn't keep track of how much. *[Non-Jury Trial Transcript, Thursday, August 6, P. 194]* Maggie helped for a time by paying \$500 a month of the \$900 monthly payment until her attorney advised her to stop.

The Capital One card (debt of \$3,962) and the Chase Mastercard (debt of \$9,000) were to finish the basement of the home that burned. Riche received no payment from the fire insurance claim to pay off these two cards.

The Court abused its discretion when it did not require payment for the debts that were incurred during the course of the marriage *[the debts that were due to*

finishing the marital home and therefore part of the fire loss] from the fire loss claim, but instead gave all fire insurance proceeds to Maggie and all marital debt to Riche.

C. The District Court abused its discretion when it failed to consider the tax implications and liquidation costs associated with liquidating Big Sky Curbing and selling the log loader.

Riche's business, Big Sky Curbing, is a sole proprietorship. There are no outstanding contracts that someone could assume if they purchased Big Sky Curbing. Riche has no long-term relationships that guarantee Big Sky Curbing a job. The contractors Riche works with have no obligation to provide him work. The business "Big Sky Curbing" has no other value other than its \$5,000 worth of equipment – it's just what Riche does. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 33, 34 and 35]*

The log loader, listed with a value of \$15,000 has been sitting at Modern Machinery for almost two years. Riche has received no offers to buy it. He hopes someone will simply make an offer on it. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 44]*

This Court examined the necessity of addressing tax consequences in the distribution of property in *DeBuff v. DeBuff*, 1999 MT 278N; 1999 Mont. LEXIS 293.

“With regard to tax consequences, we have previously held that a district court's "failure to address the tax consequences of the distribution of property" amounts to an abuse of discretion. *In re Marriage of Lee* (1991), 249 Mont. 516, 519-20, 816 P.2d 1076, 1078. In *Lee*, we stated:

In relation to tax liabilities, this Court has held that "where a property distribution ordered by a court includes a taxable event precipitating a concrete and immediate tax liability, such tax liability should be considered by the court before entering its final judgment." 249 Mont. at 519, 816 P.2d at 1078 (quoting *In re Marriage of Beck* (Mont. 1981), 193 Mont. 166, 631 P.2d 282, 285, 38 Mont. St. Rep. 1054, 1058). We required the District Court in *Lee* to make specific findings regarding the potential tax consequences of the distribution of the marital estate and to indicate how the tax liabilities would be accounted for in the distribution. See *Lee*, 249 Mont. at 519, 816 P.2d at 1078.” DeBuff at [*P23].

No consideration was given as to tax consequences or an accounting of the tax liability and costs to liquidate the business Big Sky Curbing.

D. The District Court erroneously used the financial statement of the parties, as filled out by the loan officer, to value marital assets.

In Re the Marriage of Steinbeisser, this Court held that the District Court’s valuations based upon a financial statement were not supported by substantial evidence. The Court reasoned the financial statement to be unreliable, and

therefore an abuse of discretion, based upon the Petitioner's and the banker's testimony:

When asked at trial about the financial statement, Petitioner Jim Steinbeisser testified as follows:

“Q: Okay. Now, when you issued this bank statement on December 15th of 1999, did you do a detailed inspection or calculation, if you will, of what all of the 5 S Partnership was worth?

A: No.

Q: And when you prepared this financial statement, did you do a detailed calculation of what the VS, Inc., property was worth and debts?

A: No.

Q: In connection with 5 S, before you prepared this financial statement did you have the property appraised by Mr. Cymbaluk or anybody else before you signed that financial statement?

A: No.

Q: Why not?

A: This is just a general year-to-year thing we do. The bank asks for them because we have loans with them, and it wasn't a very detailed thing. It was just kind of general.

During trial, the District Court expressed reservations about the reliability of

financial statements filled out by borrowers, contrary to its ultimate reliance on the statement. The District Court and First Bank's President engaged in the following colloquy:

Court: And aren't borrowers supposed to lie about how much stuff is worth to their banker anyway to make it look better? Isn't that kind of the standard?

President: That has happened.

Court: That has happened.

President: That has happened many times.

Further, the First Bank President testified as follows:

Q: Do you rely on your debtors to be accurate when they turn in the financial statements to you?

A: It's a practice of our bank to have the loan officer analyze the financial statement. And as the judge and I were just talking, yes, there's many times that we don't feel the machinery is worth what they say it's worth or the land what they say it's worth" *In Re Marriage of Steinbeisser*, 2002 MT 309, P26.

Petitioner Steinbeisser admitted that the numbers on his form were just an estimate and not actual values. The banker acknowledged that they do not always believe the information that they are given is accurate or trustworthy, but they need the statements for their files. The Respondent did not offer expert testimony regarding

the valuation of the real property at issue, but relied upon the financial statement submitted to the bank.

The present case is indistinguishable from the above. Here the District Court relied solely upon the June 4, 2009 financial statement. The only thing Riche did for this statement was sign it. First Interstate Bank's internal policy requires that a client with commercial loans must fill out an annual financial statement, much like in *Steinbeisser*. Mr. Haidle, the loan officer at First Interstate Bank, admitted to filling out the information on the form without consulting Riche or any independent appraisers. Researched values are not necessary to the bank as accurate figures are not required unless the loan is in excess of \$100,000. Riche's loan with the bank at the time of the hearing was only about \$18,000, well below what the bank thinks is significant to check for accuracy. When filling out this statement all Mr. Haidle was concerned about was that it was in the file, not that it was accurate. This is the same situation that was presented in *Steinbeisser* where this Court ruled that it was unjust to rely upon a financial statement when equitably dividing the marital estate.

In the present case, the Court should find that the reliance upon the First Interstate financial statement and not upon an independent appraiser for valuation of marital assets is not equitable, is erroneous, and is an abuse of discretion. The District Court's ruling must be overturned.

In Re the Marriage of Helzer, this Court held that when looking at business valuation you have to look at what the business will sustain. *In Re the Marriage of Helzer*, 2004 MT 352, P23-24. The Court also held that numbers assigned to the husband's income were fictitious as they were not supported by evidence. The reasoning used to determine sustainable income were arbitrary and "alchemy at its best". *In Re the Marriage of Helzer*, 2004 MT 352, P24.

In the present case there is no evidence that the business valuation should be placed at \$100,000. In fact the tax return for 2008 [*Respondent's Exhibit C*] showed the business making only about \$15,000. Mr. Haidle explained at trial that he was simply guessing based upon some receipts, as to what the business might be worth. He admitted that he had no experience or qualifications for valuing a business and that he just wrote the number in. When asked about the valuation on the land he again stated that he just filled in a number and no actual research was done to determine the true value of the land. When he was further pressed to speculate on the land he said he would not because he was not qualified to do so. [*Non-Jury Trial Transcript, Friday, August 7, 2009, P. 134-137*]

The financial statement introduced as Petitioner's Exhibit 24 is, to use the words of this Court, "alchemy at its best". There is no support for the numbers on the financial statement as testified by both Mr. Haidle and Riche. The District

Court provided no finding as to how the numbers on the 2009 financial statement were accurate or reliable, especially given the testimony of their origin.

Just as in *Helzer*, the Court should reverse the District Court's findings and remand for an accurate valuation of the marital assets.

II. The District Court abused its discretion in failing to consider the best interests of the minor children and improperly adopting Maggie's proposal as the Final Parenting Plan.

For four years prior to trial, the children had attended school and been almost exclusively raised by Riche in Eureka. Since separating, the children visited Maggie in Kalispell or in Eureka on a fairly regular basis. Maggie had not requested residential custody during any period of their separation, but then testified at trial that she should be the primary custodian of the children. Her plan for caring for the children was "I'll figure it out".

The best interests test pursuant to M.C.A. 40-4-212 provides:

(1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:

- (a) the wishes of the child's parent or parents;
- (b) the wishes of the child;
- (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the

child's best interest;

(d) the child's adjustment to home, school, and community;

(e) the mental and physical health of all individuals involved;

(h) continuity and stability of care;

(i) developmental needs of the child;

(k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests . . . ;

(3) A de facto parenting arrangement, in the absence of a prior parenting decree, does not require the child's parent or parents to prove the factors set forth in 40-4-219. *M.C.A.40-4-212*

Riche and Maggie had always been able to make co-parenting decisions since their separation. At trial, both parties expressed their wish to be the primary residential custodian for their children. The Court seemingly made its decision to remove the children from their family home based upon statements made by Jodi Weatherill, Riche's girlfriend. Jodi at times made reference in her testimony to "our daughter" and "we are a family" and the Court took issue with those statements. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 148 to 154]*

Jodi had testified at trial that she loves the children of Maggie and Riche, takes care of them every day, has their friends over, makes dinner, etc., but also conveyed that she is not trying to replace their mother [Maggie], but to only be an asset to a family raising children. *[Non-Jury Trial Transcript, Friday, August 7, 2009, P. 101, l.17-25, P. 102, l.1]*

The Court gave no other reason to place the children in Maggie's residential care other than its belief that Riche was trying to replace Maggie with Jodi. There was no testimony that Riche ever thwarted Maggie's ability to see the children when she wanted. There was no testimony that the children were not adjusted to their home, school, and community. There was no testimony that the physical and mental health of the children were at risk. There was no testimony that Riche did not provide continuity and stability in the care of the children. There was no testimony that the developmental needs of the children were not being cared for.

The Court had a conversation with A.R.H. for less than an hour in the midst of a heated trial. The Court had no conversation with C.A.H. From this brief testimony, the Court determined who the children would live with.

"In order to prevail, [appellant] must show an abuse of discretion by the judge, must demonstrate that there is a clear preponderance of evidence against the findings, and must overcome the presumption that the judgment of the trial court is correct. In reviewing the District Court's custody order, this Court need only look

to the record to see if the factors set forth in Section 40-4-212, MCA, were considered and then must determine whether the trial court made appropriate findings with respect to these criteria." *In re Marriage of Obergfell*, 708 P.2d 561, 562-563 (Mont. 1985)

The facts in *Dennison* were similar to the facts of the Holland family. There, the court did not misapprehend the effect of the evidence since the minor child had been living with the mother since the separation and the living situation provided stability in the child's home life. The mother resided close to the child's school, whereas the father lived approximately 40 miles away. *Dennison*, 2006 MT 56, P13-P16.

There is a clear preponderance of evidence in the present case that the District Court failed to set forth essential and determining factors in its custody determination and therefore, abused its discretion.

III. The Court improperly included personal property belonging to a third party (Jodi Weatherill) in the marital estate.

Maggie began work in Kalispell in October of 2005 and moved almost exclusively to Kalispell in 2006, purchasing the Kalispell home in 2008. Well after the parties separated, Jodi Weatherill moved in with Riche. She testified that she moved all of her belongings into the Eureka home and was living with Riche at the time of the fire.

All credible evidence presented at the trial indicated that Maggie's personal

property had been delivered to her in Kalispell well before the fire.

Riche and Jody Weatherill resided at the Eureka home utilizing all of Jodi's personal property.

In Findings of Fact, page 3, the Court clearly erred in stating that Jodi did not participate in making a claim to Safeco and that the furnishings, dishes and bedding destroyed in the fire belonged to Riche. *[Findings of Fact, Conclusions of Law and Decree of Dissolution, Page 3, para.10f]* Jodi testified that she did make a claim to Safeco for things she lost in the fire. She also testified that she brought many personal belongings from her prior marriage, including dishes, bedding, and furnishings. *[Non-Jury Trial Transcript, Thursday, August 6, P. 102, l. 23-25 and P. 103, l. 3-7]*

Maggie had not lived in the house since between June and August of 2008. Jodi had lived in the house since mid-August of 2008. The fire was February 1, 2009. No consideration was given for the items that clearly belonged to the children who had lived in the family home for their entire lives. The Court erred in finding Maggie's testimony more credible.

The Court ignored credible evidence and abused its discretion in awarding the value of the Weatherill personal property to Maggie.

CONCLUSION

The District Court erred in assigning the value of \$100,000 to the marital business.

The District Court erred in awarding the entirety of net proceeds of the fire loss claim to Maggie without consideration of the need for preparation of a new building site, cost of clean-up, and reattachment of necessary public utility service and the necessity of payment to contractors for restoration.

The Court erred in finding that Jodi had a minimal claim for personal property losses from Safeco and that the furnishings, dishes and bedding destroyed in the fire belonged to Riche.

The Court abused its discretion in giving Maggie the bulk of the value of the personal belongings lost in the fire. Maggie indicated that she had everything she wanted from the marital estate as to personal property well before the fire. Jodi lost the entirety of her belongings in the fire.

The Court abused its discretion in failing to give consideration for the items that clearly belonged to the children who had lived in the family home for their entire lives.

The Court abused its discretion when it did not require payment for the debts that were incurred during the course of the marriage from the fire loss claim, but instead gave all fire insurance proceeds to Maggie and all marital debt to Riche.

The Court erred in not requiring payment of marital debts from the liquid assets of the marital estate.

The Court abused its discretion in failing to give consideration to Riche for any of the mortgage payments he made on the Eureka home between June 2008 and February 1, 2009.

The Court abused its discretion in failing to give consideration to tax consequences or an accounting for the tax liability and costs to liquidate the business Big Sky Curbing.

The Court abused its discretion in changing the primary parenting arrangements of the children to uproot them from their childhood community simply to have them live with Maggie who had no concrete arrangements to provide for their care and stability. The Court erred in not applying the best interests standard when changing the residency of the children.

This case should be reversed and remanded to the District Court for revaluation and distribution of the parties' marital assets and debts.

This case should be reversed and remanded to the District Court for a determination of a parenting plan in the best interests of the children.

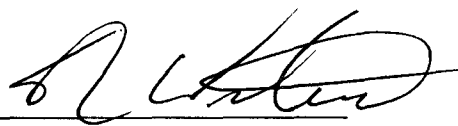
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Respectfully submitted this 29 day of June, 2010.

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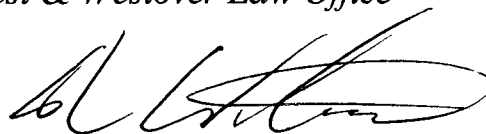
CERTIFICATE OF SERVICE

I herby certify that I cause a true and accurate copy of the forgoing to be
mailed to:

David F. Stufft
P. O. Box 2559
Kalispell, MT 59903

Dated this 30 day of June, 2010.

Best & Westover Law Office

A handwritten signature in dark ink, appearing to be 'M. L. H.', written over a horizontal line.

Attorneys for Appellant/Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, does not exceed 7,500 words, excluding table of contents, table of citations, certificate of service, and certificate of compliance.

Best & Westover Law Office

A handwritten signature in black ink, appearing to be 'N. Westover', written over a horizontal line.

Attorneys for Appellant/Respondent